Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 21, 2021

CLAIM NO. 200774715

NEW WAVE COMMUNICATIONS PETITIONER

VS. **APPEAL FROM HON. TONYA M. CLEMONS, ADMINISTRATIVE LAW JUDGE**

DEREK O'NEAL and
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and BORDERS, Members.

ALVEY, Chairman. New Wave Communications ("New Wave") appeals from the January 15, 2021 Opinion, Award, and Order rendered by Hon. Tonya M. Clemons, Administrative Law Judge ("ALJ"). The ALJ found Derek O'Neal ("O'Neal") sustained a work-related right ankle injury on September 7, 2007 when an antenna he had climbed to install a cable drop broke at the base causing him to fall. The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability

("PPD") benefits, and medical benefits. Although O'Neal's claim was not filed within two years after New Wave's insurer stopped paying TTD benefits, the ALJ determined it was timely because there is no evidence he received proper notification pursuant to KRS 342.040(1); therefore, the statute of limitations was tolled. New Wave also appeals from the February 16, 2021 Order denying its Petition for Reconsideration.

On appeal, New Wave argues the ALJ erred by *sua sponte* taking judicial notice of the absence of records contained in LMS to find the statute of limitations was tolled. It argues the relevant inquiry is whether a statute of limitations letter was produced, not whether it was received by O'Neal. New Wave next argues the ALJ erred by failing to reduce O'Neal's benefits award due to a safety violation pursuant to KRS 342.165(1). New Wave finally argues it was prejudiced by having to defend a stale claim. While we agree that an ALJ's determination must be based upon the evidence introduced by the parties, the review of LMS to determine if there was any indication of a notice letter, in this instance, constitutes no more than harmless error. We affirm the ALJ's determinations that the statute of limitations was tolled, the claim was timely filed, and the refusal to reduce O'Neal's award due to a safety violation pursuant to KRS 342.165(1). We also find no merit to New Wave's argument it was prejudiced for having to defend a "stale" claim, and we therefore affirm on all issues.

Since the issues on appeal involve the application of KRS 342.040(1) and KRS 342.165(1), in addition to the concerns regarding the ALJ's review of the

record in LMS, and defending a "stale" claim, we will not discuss the medical evidence.

O'Neal filed a Form 101 on May 22, 2020, alleging he injured his right ankle after he fell while installing a cable drop in the course of his job duties as an installer for New Wave on September 7, 2007. When he was climbing down an antenna, it broke at the base, causing him to fall.

New Wave filed a Form 111 denying the claim, stating O'Neal's injury did not arise from his employment. It also asserted a special answer alleging O'Neal's claim was barred by the statute of limitations since it was not filed within two years after the last payment of TTD benefits. New Wave subsequently filed a Form SVE alleging O'Neal committed safety violations by failing to use equipment and fall protection devices in violation of company safety policy. It also stated the fall was caused by O'Neal's failure to use the provided equipment and instead tied off to an antenna that broke at its base. New Wave did not file any documentation supporting either the special answer or the SVE.

O'Neal testified by deposition on July 17, 2020, and at the hearing held November 18, 2020. O'Neal was born on May 25, 1986, and he currently resides in North Richland Hills, Texas. O'Neal is a 2004 high school graduate. He has a bachelor's degree in sports management and marketing, and a master's degree in security management with a focus on occupational safety. He is currently working on an additional master's degree in sports management. O'Neal has had training in first aid and safety. At the time of the accident, he was a resident of Ohio County, Kentucky. He moved to Texas in 2016 for his job.

O'Neal testified he worked as an installer for Direct TV from 2004 to 2005. That job involved crawling and climbing ladders. He left that job to work in light assembly at Morgantown Plastics Company. He left that job in 2006 to work for New Wave. He worked at New Wave until 2009. He stated the New Wave job was similar to his employment with Direct TV, except that he also used a bucket truck. He joined the Kentucky Army National Guard in 2010, and eventually became an officer. Despite the 2007 injury, he was medically cleared to join the National Guard, and he was able to pass the physical fitness test. After moving, he joined the Texas Army National Guard.

O'Neal has been a safety and loss prevention manager since 2016. He currently works in that capacity for Chewy.com, an online pet fulfillment center. He currently earns greater wages than he earned at the time of the accident. Prior to working for Chewy, O'Neal was a safety specialist at Amazon. At Chewy, he performs inspections, audits, and handles workers' compensation claims. He continues to take over-the-counter Ibuprofen each morning for right ankle swelling. O'Neal reported he had no right ankle problems prior to the September 7, 2007 accident.

On September 7, 2007, O'Neal was performing a cable installation at a house in Rockport, Kentucky. He ran a cable from the box on a utility pole to an antenna tower on a customer's house. He utilized the antenna as a tie off due to its proximity to the service box. He strapped to the antenna tower, climbed up, connected the cable, and on the way down, the base of the tower broke causing him to fall and injure his right ankle. He stated the antenna was attached to the house,

and he was unable to see that the base was rusted. He also testified that he could have placed a ladder against the house. O'Neal testified he was unsure if he violated any company safety policy, but he was not written up or reprimanded after the accident. He admitted it would have been safer to use a ladder, and using the antenna was not a standard procedure.

O'Neal was taken by ambulance to Ohio County Hospital after the accident. He underwent surgery by Dr. Casey Starsiak, an orthopedic surgeon at the Twin Lakes Regional Medical Center in Leitchfield, Kentucky. Dr. Starsiak surgically installed a plate and screws. Dr. Starsiak removed the hardware in 2008. O'Neal was off work from the date of the accident until November 18, 2007, during which period he received TTD benefits. He returned to the same job, and continued to work for New Wave until June 2009. He missed no time from work when Dr. Starsiak removed the screws. O'Neal testified he never received a letter advising him his benefits had been terminated and that he had two years to file his claim.

A Benefit Review Conference was held on October 8, 2020. New Wave disputed whether O'Neal sustained a work-related injury, and the parties could not stipulate that he has the capacity to perform the type of work he engaged in on the date of the injury. The specific issues preserved for resolution included work-relatedness/causation, statute of limitations/repose, average weekly wage, TTD, ability to return to work, unpaid or contested medical expenses, whether O'Neal committed a safety violation pursuant to KRS 342.165(1), and entitlement to benefits per KRS 342.730.

In the January 15, 2021 Opinion, Award, and Order, the ALJ determined O'Neal sustained a work injury on September 7, 2007. She additionally found the statute of limitations was tolled pursuant to New Wave's failure to satisfy its statutory notice obligations pursuant to KRS 342.038(1) and KRS 342.040(1). The ALJ cited to the holding in H. E. Neumann Co. v. Lee, 975 S.W.2d 917 (Ky. 1998) in support of her determination. The ALJ noted she had reviewed LMS, which does not contain a WC3S suspension letter. The ALJ noted New Wave's argument that the stipulation by the parties regarding the last date TTD was paid satisfied its *prima facie* burden to prove the claim was not timely filed. New Wave argued the burden shifted to O'Neal who failed to prove the statute of limitations should have been tolled. The ALJ noted O'Neal testified he did not receive a letter advising him that he had two years in which to file a claim from the date his TTD benefits were terminated. The ALJ specifically found, "Having reviewed all the evidence on this issue, the ALJ finds Plaintiff's testimony credible and Defendant's failure to satisfy its statutory notification requirements tolled the statute of limitations…."

The ALJ also acknowledged New Wave's argument regarding a 15% reduction in benefits for a safety violation pursuant to KRS 342.165(1). Citing to Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996), the ALJ correctly noted that in order to find a safety violation pursuant to KRS 342.165(1), the record must contain evidence of a violation of a safety provision (state or federal) or a specific employer safety policy. The record must also contain evidence of the intent to violate such safety rule or policy. She additionally noted that mere inadvertent

negligence is insufficient to make such a finding and trigger the reduction. The ALJ determined, after reviewing all of the evidence on the issue, New Wave failed to establish O'Neal violated any specific safety rule or provision. The ALJ was likewise not convinced the evidence supported a finding that O'Neal possessed the requisite intent to violate any such policy or provision. She therefore declined to find O'Neal's award must be reduced by 15% pursuant to KRS 342.165(1).

The ALJ awarded TTD benefits from September 7, 2007 through November 18, 2007. She also awarded PPD benefits for 425 weeks based upon the 4% impairment rating assessed by Dr. Rick Lyon, along with applicable interest. She found O'Neal is entitled to medical expenses "reasonably required for the cure and relief" from the effects of his work injury.

New Wave filed a Petition for Reconsideration requesting the ALJ to provide additional findings of fact regarding her determination that the statute of limitations does not bar O'Neal's claim. It argued O'Neal had the burden to prove the WC3 suspension letter was not produced, and his self-serving testimony was insufficient to toll the statute of limitations. It also argued O'Neal did not designate the contents of the LMS records as evidence, and the ALJ erred by *sua sponte* taking notice of any of those records. New Wave also requested additional findings of fact regarding the safety violation. It argued O'Neal's testimony demonstrated conscious wrongdoing, and his awareness of violating company policy.

The ALJ denied the Petition for Reconsideration in an Order issued February 16, 2021. She noted New Wave failed to point to any patent errors. She additionally noted there is no evidence in the record of a company safety policy

regarding using an antenna for a tie-off. She determined New Wave failed to establish any company safety policy that O'Neal intentionally violated.

As an affirmative defense, New Wave had the burden to prove the application of the statute of limitations. Lizdo v. Gentec Equipment, 74 S.W.3d 703, 705 (Ky. 2002). Since New Wave was unsuccessful in its burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

KRS 342.185(1) provides as follows:

> Except as provided in subsections (2) and (3) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident. . . . **If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.** (emphasis added)

KRS 342.040(1) provides as follows:

> Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease . . . .In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits shall be due and payable not less often than semimonthly. **If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.** (emphasis aded)

KRS 342.185(1) and KRS 342.040(1) operate together to toll periods of limitations until after the payment of voluntary income benefits ceases in order to protect injured workers from being lulled into a false sense of security by receiving income benefits and failing to pursue a claim. KRS 342.040(1) places an affirmative duty upon an employer who terminates or fails to make payments when due to notify the Commissioner of such failure. An employer who fails to comply with KRS 342.040(1) is estopped from raising the limitations defense because it effectively prevents the Commissioner from complying with its duty to advise the employee of his or her right to prosecute the claim. Billy Baker Painting v. Barry, 179 S.W.3d 860, 865 (Ky. 2005). *See also* H.E. Neumann v. Lee, supra. It is unnecessary to establish an employer acted in bad faith for it to be estopped from raising the statute of limitations defense. Id. Whether the statute of limitations is tolled due to an

employer's failure to comply with KRS 342.040(1) depends on the facts and circumstances of each case. Colt Management Company v. Carter, 907 S.W.2d 169, 170 (1995).

New Wave filed a special answer asserting the statute of limitations defense without supporting documentation. It was incumbent on New Wave, who bore the burden of establishing its defense, to demonstrate its insurer filed the appropriate notice with the Kentucky Department of Workers' Claims, and a notice letter was generated and sent to O'Neal. O'Neal testified he did not receive such a letter. He did not bear the burden of attempting to prove a negative, in this instance the insurer did not appropriately notify the Kentucky Department of Workers' Claims. Therefore, due to the lack of evidence establishing the statute of limitations was not tolled, we affirm the ALJ's determination regarding the lack of proper notification required by KRS 342.040(1). The fact remains there is no evidence of record supporting New Wave's special defense.

We also find substantial evidence supports the ALJ's determination that O'Neal's award should not be reduced by 15% pursuant to KRS 342.165(1) and a contrary result is not compelled. The purpose of KRS 342.165(1) is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. *See* Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). New Wave's burden was to demonstrate O'Neal intentionally violated a safety statute, regulation, or rules. *See* Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). KRS 342.165(1) provides:

> . . . If an accident is caused in any degree by the intentional failure of the employee to use any safety

> appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

The reduction of an award of benefits pursuant to KRS 342.165(1) requires proof of a violation of a specific safety provision, whether state or federal, or a company safety policy. The evidence of "intent" to violate a specific safety provision must also be established. Finally, the violation must cause the accident. Application of KRS 342.165(1) does not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002).

It is undisputed that O'Neal injured his right ankle when he fell after the antenna he was tied to in order to install a cable drop broke at the base. However, there must also be evidence of the intent to violate a specific safety provision as noted above. In Terry v. AFG Industries, WCB Opinion No. 2000-94292 (January 2, 2003) (which we cite for consistency, not authority), this Board held the following regarding the element of intent:

> Inadvertent negligence by the employee is not enough. There must be a level of awareness by the party not merely with regard to the existence of a safety regulation or policy, but an immediate cognizance that the conduct causing the injury is in contravention to the policy or regulation. Barmet of Kentucky v. Sallee, Ky. App., 605 S.W.2d 29 (1980). In other words, the injury must be the result of conscious wrongdoing. The act causing the injury must be desired by the doer, and the consequences reasonably foreseeable. The violation must be advertent and rise to the level of at least reckless disregard or willful misconduct. See, Larson's Workers'

> Compensation, § 31. Only then, if the accident caused by the employee is attributable "in any degree" to his failure to use any safety appliance furnished by his employer, or his failure to obey any lawful and reasonable order or administrative regulation of the Commissioner or his employer for the safety of employees or the public, shall the compensation for which his employer is liable be decreased by 15% in the amount of each payment.
>
> In the instant claim, we agree with Terry that the record is devoid of any evidence indicating that he consciously disregarded the safety policies of AFG or willfully ignored the required use of various safety appliances to prevent the destabilization of containers and flatbeds for loading purposes. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). On this single occasion, after already loading several trucks that day and in a rush to do his job, he inadvertently forgot to make sure the appliances were locked into place. The accident occurred, therefore, not as a result of any willful misconduct on Terry's part, but solely due to an act of simple negligence. Consequently, the ALJ's application of the 15% penalty to Terry's award was in error.
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> Slip opinion at 10.

The ALJ determined New Wave failed to file any evidence of a safety rule or company policy which O'Neal purportedly violated. The ALJ simply was not convinced, based upon the evidence, that O'Neal intentionally violated a safety rule. This is factual determination, which falls within the ALJ's purview. The record is devoid of any evidence indicating O'Neal consciously disregarded New Wave's safety policies, or willfully ignored any safety rule. REO Mechanical v. Barnes, supra. The ALJ acted within her authority in drawing this conclusion. As fact-finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence, and reasonable inferences to be drawn. Square D Co. v.

Tipton, 862 S.W.2d 308 (Ky. 1993). Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997).

Finally, we determine New Wave was not prejudiced by having to defend a stale claim. O'Neal clearly sustained a compensable work injury on September 7, 2007, for which New Wave paid TTD and medical benefits. There is no evidence its insurer complied with the statutory reporting requirements to the Kentucky Department of Workers' Claims. O'Neal testified he was unaware of the time limitations of filing a claim. There is no evidence contradicting O'Neal's testimony, or that appropriate notice was provided. Therefore, we affirm the ALJ's determination.

Accordingly, the Opinion, Award, and Order rendered on January 15, 2021, and the Order denying New Wave's Petition for Reconsideration rendered February 16, 2021 by Hon. Tonya M. Clemons, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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